Written by **Jack Kenny** on April 21, 2010

Obama Says No “Litmus Test” for High Court Pick

"President Obama said Wednesday that he considers it ‘very important’ that women be allowed to make decisions about their bodies but would not impose a ‘litmus test’ on abortion for potential nominees." That was the lead sentence in today’s Washington Post story on a private meeting the President had with key Senators on his upcoming nomination of a replacement for retiring Justice John Paul Stevens on the U.S. Supreme Court. But a few paragraphs later we get a clearer view of what no "litmus test" really means. Following the meeting, the President was asked by a reporter if he would nominate someone who does not support "abortion rights."

You know, I am somebody who believes that women should have the ability to make often very difficult decisions about their own bodies and issues of reproduction," he said. "Obviously this has been a hugely contentious issue in our country for a very long time. I will say the same thing that every president has said since this issue came up, which is I don’t have litmus tests around any of these issues." Then he added the following:

> But I will say that I want somebody who is going to be interpreting our Constitution in a way that takes into account individual rights, and that includes women’s rights. And that’s going to be something that’s very important to me, because I think part of what our core constitutional values promote is the notion that individuals are protected in their privacy and their bodily integrity, and women are not exempt from that.

In other and fewer words, no one who has a dissenting opinion or even a doubt about the validity of the 1973 Supreme Court ruling that abortion is a right guaranteed by the U.S. Constitution will be considered for the nomination. That’s what "no litmus test" means in the Orwellian "Newspeak" world of Washington in 2010. A nominee may have differences or doubts on other issues and other court rulings. But unless that nominee is a 100-percent true believer in a "constitutional right" nowhere mentioned nor even hinted at in the Constitution itself, he or she would be as welcome at the next confirmation hearing as a skunk at a garden party.

The reason Obama can say, and perhaps even believe, that he doesn’t have a "litmus test" is that it was decided long ago that the term describes only the demands of anti-abortion activists. Champions of abortion "rights" are merely unbiased defenders of "individual rights" and "women’s rights" when they insists that no one be permitted on the high court who does not bend the knee to the *Roe v. Wade* decision that overturned the laws of more than 40 states and a legal and medical tradition going back to and beyond the Hippocratic Oath: ("I will not give a fatal draught to anyone if I am asked, nor will I suggest any such thing. Neither will I give a woman means to procure an abortion.")

The legal pretense is that the seven justices who handed down that ruling did so not from and personal

ideological or political beliefs, but were merely following the precepts of the Constitution they had sworn to uphold. Yet the majority and concurring opinions could offer no article, no clause in the Constitution to substantively support that claim. Instead they relied on a previous ruling, authored by Justice William Douglas, describing a vague, undefined "right to privacy" that covered whatever the justices wanted it to cover. It is reflected in the First, Third and Fourth Amendments or in the Ninth, or at least in the Fourteenth. It didn't matter, really, where it was or wasn't, the court was determined to find it. It is, in Justice Douglas's immortal phrase, in one of those "penumbras, formed by emanations" from "other" rights, the ones the Constitution actually mentions.

There are, of course, certain privacy rights guaranteed by the Constitution-the right to the free exercise of religion, the right to be free from unreasonable searches and seizures and others protected by the Bill of Rights. But to argue that because the Constitution recognizes certain personal rights it creates a nebulous "right of privacy," for which the justices may fill in the blanks, is a stretch the majority in *Roe* was all too willing to make.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." So declares the Constitution in the Ninth Amendment. But neither does the Constitution affirm unenumerated rights. The Constitution delegates certain powers to the government of the United States and adds, most notably in the Bill of Rights, certain things it may not do. The rest is left to "the States and the people, respectively" as the Tenth Amendment prescribes.

And where was abortion a legal right "retained by the people" before the court declared it so? In Connecticut, where it had been outlawed by the people's representatives since 1820? In New Hampshire, where it had been banned since 1848? New York, California, Colorado, and a handful of other states had passed liberal abortion laws prior to *Roe*, but the high court's ruling, based on nothing in the language or the history of the Constitution, decreed a new legal standing for abortion in all 50 states. Neither the Ninth, nor Tenth Amendment nor any other portion of the Constitution was written to guarantee whatever unwritten rights might be found in the imagination of the judges.

Nor had "abortion rights" ever been considered a part of the "privileges and immunities of citizens of the United States," nor state laws prohibiting abortion a violation of the "equal protection of the laws" required by the Fourteenth Amendment. As the late Justice William Rehnquist noted in his dissent in *Roe*, a large majority of the states had laws proscribing abortion on the books at the time they ratified that amendment. If they were ratifying an amendment that guaranteed "abortion rights," they were blissfully unaware of it.

Does it matter what the authors of the amendments and their contemporaries meant by the language they incorporated into the Constitution? May we not interpret it differently to suit our time and place in history? As President Clinton might have said, it depends on what the meaning of "we" is. The general understanding of an amendment at the time of its passage is what was voted on and ratified by the Congress and the people's representative in the state legislatures. No one but nine Supreme Court justices voted on the fundamental alteration of constitutional law required to produce the "right" to abort preborn infants. "We the people" may change the Constitution as our forebears did-through the amendment process. Altering it by judicial decree, even to create new "rights," makes the Constitution and our liberties less, not more, secure.

For as both sides in the abortion battle know, any "right" established by judicial fiat can be overturned the same way. That is one reason why abortion remains, in the President's words, a " hugely contentious issue" surrounding the Supreme Court. And it is why Obama, with "no litmus test," and a

predominantly "pro-choice" Senate will not allow anyone who questions the legal edifice supporting the "culture of death" anywhere near a seat on that august tribunal.